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IN THE

Supreme Court of the United States

October Term, 1957

No. 592

HYMAN HARVEY KLEIN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

KLEIN REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This reply to respondent's brief filed December 31, 1957 is respectfully submitted pursuant to Rule 24(4) of this Court.

1. *The Roer and Koerner Statements to Internal Revenue Agents* (Resp. 30-31).* The hearsay character of the statements, their prejudicial nature and their submission to the jury as true are not contested. Indeed, respondent in its brief relies on the very truth of the statements, as did the prosecutor with such damaging effect at the trial (Resp. 14, 15, 17, 30, 31; Pet. 18-20). However, respondent now

* "Resp." refers to respondent's brief; "Pet." refers to Klein's petition herein; and "R" refers to the Appendix to appellants' briefs in the Court of Appeals.

wholly abandons the position taken by the Government before the Court of Appeals and adopted by that court, namely, that the statements could not be in furtherance of the conspiracy and therefore admissible unless "false or misleading" (Pet. A22).

Based both on logic and on the very decisions of this Court cited by respondent at page 30, true statements cannot be considered acts in furtherance of a conspiracy. As the Government stated below, "To be in furtherance, they could not have been true or candid" (Govt. Br. in Ct. of App., p. 94). Nevertheless, the trial court nowhere charged that the statements might be considered only to the extent that they were found to be untrue. The general charge that they must be in furtherance was a wholly inadequate guide which permitted the jury to find the statements to be in furtherance and yet rely on their truth, as urged by the prosecution. In apparent recognition of this, the Government here reverses its position and argues that, if in furtherance of the conspiracy, the statements are admissible "whether true or false" (Resp. 30).

2. *The Roer-Alprin-Koerner Conspiracy* (Resp. 27). Whether respondent now considers the conspiracy by Roer, Alprin and Koerner to file false tax returns to be the conspiracy charged or "only one facet of the alleged means" is wholly immaterial. The fact remains that the trial court relied on that conspiracy as a basis for denying Klein's motion for judgment of acquittal, the prosecution in its summation urged the jury to convict Klein on the basis of that conspiracy and the trial court in its charge permitted the jury to do so. The Court of Appeals has held that Klein could not be convicted on the basis of that conspiracy (Pet. 10-11, A6, A10). Respondent ignores that holding as well as the decision of this Court in *Yates* v. *United States*, 354 U. S. 298 (1957), which in the light of the holding of the Court of Appeals requires a reversal.

3. *The Trial Court's Amendment of the Indictment* (Resp. 21-28). The issue here raised is not a technicality of criminal pleading—whether every alleged "means" of a conspiracy must be proved (Resp. 25-26). The question goes to the core of criminal jurisprudence, the basic right of a criminal defendant to be apprised of the charge against him and hence his right not to be misled by the very facts alleged in the indictment and bill.

The fifth count contains six paragraphs, two couched in general terms of a conspiracy to defraud and the concealment of income, and four alleging specific acts. Of the latter the first three expressly charge the filing of tax returns by Alprin, Koerner and Roer wherein ordinary income was reported as capital gain to conceal the nature and source of income; the fourth charges that entries were made in the Tivoli books to conceal income (R. 142-44). The bill of particulars states that the three returns were false in the single respect that income received by Roer, Alprin and Koerner from Tivoli was misreported (R. 128-29).

In the early stages of the trial the court adopted what we submit is the only reasonable interpretation of the indictment and bill, as follows (R. 460-61):

> "Furthermore, the fifth count, fairly read, charges the defendants therein named with a dishonest concealment of the nature of their business activities and the source and nature of their income by the filing of partly false returns of Alprin, Koerner and Roer. It is utterly silent as to false statements, if any, to the Government about the disposition of the certificates that impeded, impaired, obstructed, defeated or defrauded the Government in its tax collection function, as is the bill of particulars. In the light of such silence the defendants cannot be now held to answer a charge not contemplated by the indictment or the bill of particulars." (See also R. 173, 444-47, 456-57)

By the conclusion of the trial, however, the interpretation of the fifth count had been so broadened that the jury was permitted to convict Klein even if the evidence showed that the tax returns filed by Roer, Alprin and Koerner were true and accurate in every respect (Pet. 16; Resp. 24, 27). The trial court itself expressed doubt and confusion as to whether the narrow or broad interpretation should obtain.*

No criminal defendant charged with a felony should be in doubt as to the meaning of the indictment. The uncertainty expressed by the trial court attests the reality of that expressed by the defendants throughout.

Under the authorities set forth in the petition (pp. 14-15), where the trial court itself has expressed its doubt as to whether a narrow or broad construction should be given to the indictment, the Fifth and Sixth Amendments require that all doubts be resolved in favor of the defendant, who is entitled to be "informed of the nature and cause of the accusation". Especially should this be so where the broad construction would permit a conviction predicated on proof which is the very reverse of the particulars alleged in the indictment and bill.

The prejudice to Klein is manifest, since the Court of Appeals has held that he could not have been convicted for participating in the conspiracy of Roer, Alprin and Koerner to file false returns (Pet. 10, A10).

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* For example, soon after the acquittal on the first four counts the court stated to the prosecutor (R. 933):

> "Well, then, you are beginning to persuade me that maybe I was wrong in assessing the fifth count vis-a-vis the first, second, third and fourth. I thought I understood this but you are bringing me right back to the confusion that apparently has assailed defendants' counsel since the commencement of this trial." (See also R. 866, 869.)

4. *Impeding the Collection of Taxes Not Due* (Resp. 18-21). The fifth count charges a conspiracy to impede the collection of taxes. The trial court has held that no additional taxes were due from Klein. Accordingly, the assessment and collection of additional taxes with respect to Klein was held "inherently impossible" from the beginning. The decision below is in clear conflict with *Ventimiglia* v. *United States*, 242 F. 2d 620 (4th Cir. 1957), and cannot be distinguished on the ground of an "intervening circumstance" (Resp. 21, ftn. 13). The trial court here appreciated that the question was "novel" and "fraught with danger" and agreed that it "should be tested" (Pet. 22).

5. *Respondent's Refusal to Accept the Acquittal on the First Four Counts.* Throughout its brief respondent ignores the acquittal as to the first four counts and treats the seventeen corporations as "paper" devices used solely for billing purposes. Accordingly, the income of those corporations is treated as income earned by Klein and his three Canadian associates (*e.g.*, Resp. 6, 8, 9, 10, 11, 19, 23, 26). This repudiation of the acquittal has an obvious purpose—to insure that Klein's income may be regarded as involved in the fifth count conspiracy to conceal the nature and source of income. If his income were not involved, not only would there be no motive for Klein to conceal the income of the others but, as the Court of Appeals expressly held, Klein could not be convicted for any conspiracy by Alprin, Koerner and Roer to conceal their income by filing false returns (Pet. 10, A10).

6. *The Stricken Evidence* (Resp. 33-35). Relying on a decision which does not concern stricken evidence, respondent dismisses as "not in point" the authorities relied upon by petitioner, ignoring even *Throckmorton* v. *Holt*, 180 U. S. 552 (1898), and *Snipes* v. *United States*, 230 F. 2d 165 (6th Cir. 1956), which are in direct conflict with the decision below on this very point (Pet. 26).

7. *The Second Circuit Standard for Determining the Sufficiency of Evidence* (Resp. 37-39). Despite respondent's contention to the contrary, there is a recognized conflict among the circuits as to the standard to be used to determine the sufficiency of evidence in a criminal case in passing on a motion to acquit. Indeed, one Justice of this Court has given express recognition to the "Second Circuit doctrine" as a justification for the granting of certiorari. See *Stickel* v. *United States*, 76 S. Ct. 1067, 1 L. Ed. 2d 30 (1956). If, as respondent states (p. 38), there is no substantial difference between the standards now being applied in the several circuits, it would appear appropriate that this Court review the question and, if it agrees, so hold.

CONCLUSION

Respondent nowhere shows that the questions raised in the petition do not warrant review by this Court. On the contrary, respondent's discussion of the questions on the merits serves to emphasize their significance in terms of certiorari.

New York, N. Y.
January 8, 1958.

Respectfully submitted,

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